UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

craigslist, Inc., **Plaintiff,** **v.** **HENRY D. McMASTER, et al.** **Defendants.**	**Civil Action No. 2:09-cv-01308-CWH** **PLAINTIFF CRAIGSLIST'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS**

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INTRODUCTION

Plaintiff craigslist, Inc. ("craigslist") commenced this action on May 20, 2009 seeking declaratory and injunctive relief against Defendant Henry D. McMaster, in his official capacity as Attorney General, and others to prevent them from following through on Mr. McMaster's public threats to criminally prosecute craigslist and its management for allegedly failing to prevent the craigslist website from being used by third persons to post advertisements for prostitution. craigslist's Complaint explains that the threatened prosecution would violate federal statutory and constitutional law. In the face of craigslist's motion for emergency injunctive relief, filed with its Complaint, Defendants immediately consented to entry of a preliminary injunction barring them from instituting any such prosecution during the pendency of this action. Now, in their first substantive response to the Complaint, Defendants urge the Court to dismiss craigslist's claims, arguing, first, that this Court must abstain due to the alleged pendency of a state criminal investigation and, second, that the threatened prosecution would not violate federal law in any respect. As demonstrated below, Defendants' arguments are meritless.

As alleged in the Complaint, craigslist operates a popular Internet classified service used by over 50 million Americans each month, mostly free of charge, to find employment, housing, goods and services, friendship, romance, and local community information. Each month, users post over 40 million classified ads in over 100 categories, generating over 20 billion page views. Although used overwhelmingly by well-intentioned, law-abiding citizens, the craigslist website, like any means of communication, can be abused by third-parties, including persons engaged in unlawful prostitution, despite craigslist's best efforts to prevent such misuse.

In the weeks immediately before this lawsuit, Mr. McMaster issued a series of direct and public threats to criminally prosecute craigslist and its management based on the alleged presence on the craigslist website of third-party ads that, according to Mr. McMaster, solicited prostitution or contained pornographic images. Mr. McMaster first stated this threat in a letter addressed to craigslist that he posted on his office's website and publicized during a press conference. That letter stated that craigslist management would face criminal investigation and criminal prosecution if craigslist did not, within ten days, remove from the South Carolina-directed portions of its website all categories and functions that make it possible for third parties to post content soliciting prostitution or containing pornographic images.

In response, craigslist advised Mr. McMaster that any such prosecution would violate 47 U.S.C. § 230(c)(1), which generally immunizes online service providers such as craigslist from liability for unlawful third-party content, and the First Amendment. craigslist also pointed out that, notwithstanding its immunity, it had long maintained various measures to deter users from posting inappropriate ads (including ads for prostitution) and had, during the week after Mr. McMaster issued his threat, introduced still more voluntary deterrents to such ads.

Mr. McMaster nevertheless persisted in making direct, public threats to criminally prosecute craigslist. As a result, craigslist faced the untenable choice of either (a) completely shutting down all portions of its website that are directed at localities in South Carolina, as that would be the only way to ensure that none of those portions are ever misused by a third-party to post an ad objectionable to Mr. McMaster, or (b) putting itself and its management at risk of imminent criminal prosecution that craigslist believes would violate its fundamental federal rights. Stuck between a rock and a hard place, craigslist filed the present action. The Complaint's allegations, which must be taken as true at this stage, establish that Mr. McMaster's threatened prosecution would violate craigslist's rights under 47 U.S.C. § 230, the First Amendment, and the Commerce Clause of the U.S. Constitution.

As explained in detail below, Defendants' motion to dismiss craigslist's action is without merit. *First*, Defendants' threshold argument that this Court must abstain from adjudicating craigslist's claims fundamentally misreads the line of federal abstention cases following *Younger v. Harris*, 401 U.S. 37 (1971). Binding Supreme Court and Fourth Circuit precedent confirms that only a pending state *judicial proceeding* may trigger *Younger* abstention. Yet Defendants do not, and apparently cannot, point to any such proceeding.

Second, Defendants' arguments against craigslist's Section 230 claim ignore that the Complaint's allegations plainly establish each of the three elements for statutory immunity: (1) craigslist's status as a "provider" of an "interactive computer service, (2) the fact that all of the allegedly unlawful postings were created and developed by third parties, and (3) the fact that holding craigslist liable for those postings would "treat" it as a "publisher" of those postings. Defendants do not contest that the first and third elements are met here, but urge that craigslist be deemed the creator/developer of the ads posted by users simply because it provides named categories (*e.g.*, "erotic" or "adult" services) into which users may place such ads. But the mere provision of categories to organize third-party content does not alter the fact that the ads are created and developed entirely by the third parties who post them. Defendants also go to lengths to try to show that Section 230 does not protect against State *criminal* liability. That proposition, however, is flatly contrary to both the statute's plain language and uniform precedent on this question. Equally unpersuasive is Defendants' policy argument that enjoining Mr. McMaster's threatened prosecution would be contrary to Section 230's purpose and "open the floodgates" for unlawful activity on the Internet. In fact, application of Section 230 here will be fully consistent with its purposes and will do nothing to prevent Defendants from investigating and prosecuting those purportedly engaged in unlawful activity.

Third, Defendants' arguments against craigslist's constitutional claims are also unavailing. Those arguments fail to take into account the fact, alleged in the Complaint and required to be taken as true on a motion to dismiss, that the only feasible way for craigslist to comply with Mr.

McMaster's demands would be to shut down entirely all of its South Carolina-directed sites. Thus, absent the relief sought in this lawsuit, Defendants' conduct would both silence huge quantities of lawful speech protected under the First Amendment and impermissibly burden commerce outside South Carolina's borders.

STATEMENT OF FACTS

The craigslist Service

Since its beginnings in 1995 as an informal email list linking a group of friends and co-workers in the San Francisco Bay area, craigslist has grown exponentially in popularity and scope. (Compl. ¶ 17.) Today, the main craigslist website — www.craigslist.org — is world renowned. It provides largely free, localized forums for classified ads and interactive discussions for over 570 cities in 50 countries worldwide and is one of the most visited websites in the world. (*Id.* ¶¶ 17, 20.) The craigslist service is organized into separate sites, each dedicated to a particular locality. craigslist maintains sites for more than 300 localities in the U.S., including six in South Carolina (Charleston, Columbia, Florence, Greenville/Upstate, Hilton Head, and Myrtle Beach). (*Id.* ¶ 21.)

All of the classified ads and other postings available on the craigslist website are created entirely by the site's users. (*Id.* ¶ 21.) Collectively, this third-party content is both extremely voluminous and ever-changing: at every moment, older ads expire, are edited by the person who posted them, or are removed, and new ads are posted. (*Id.* ¶ 21.) Users have a choice of categories and subcategories within which to place their postings, including "community," "personals," "housing," "for sale," "services," "events," and "jobs." The site also includes "discussion forums" dedicated to all manner of political, social, and religious topics. (*Id.* ¶ 22.)

Users of craigslist generally do not have to pay to post ads or notices. (*Id.* ¶ 23.) Exceptions include (1) job ads in certain cities and some apartment listings in New York City, for which fees are charged; (2) ads in the recently terminated erotic services category, for which a $5 fee had to be paid via credit card; and (3) ads in the new adult services category, for which a $10 fee has to be paid via credit card.[1] (*Id.* ¶ 23.) All postings on the craigslist site may be viewed entirely for free, from anywhere in the world, by anyone with Internet access. (*Id.* ¶ 25.)

All usage of craigslist is subject to craigslist's detailed Terms of Use, which are available through prominently displayed links throughout the site. (Compl., Ex. A.) Before posting any ad, users must first affirmatively declare their acceptance of these Terms by clicking an "ACCEPT" button located below a full-text display of the Terms. (*Id.* ¶26.) The Terms of Use explicitly prohibit the posting of any content that is "unlawful" or that "advertises any illegal service," including in particular "any offer or solicitation of illegal prostitution." They similarly prohibit any posting "that is pornographic or depicts a human being engaged in actual sexual conduct." (*Id.* ¶ 27.) To promote compliance with its Terms of Use, craigslist employs various self-regulatory measures, including filters that block problematic ads before they reach the website and a community flagging system that empowers users to "flag" inappropriate ads for removal. For the recently-terminated "erotic" category and the new "adult" category, craigslist implemented additional, targeted deterrents, as described below. (*Id.* ¶ 28.)

The Former Erotic Services Category

Until mid-May 2009, one of the "services" categories of the craigslist website was titled "erotic." That category was established several years ago at the request of craigslist users so that legal escort services, massage workers, exotic dancers, phone chat lines, webcams, and other services whose ads often contain adult content would have a dedicated area in which to post their ads. (*Id.* ¶ 29.) Previously, craigslist users tended to post such ads to a variety of different areas

[1] State Attorneys General suggested that craigslist require credit card payments for postings to the erotic services category on the theory it would further encourage compliance with site guidelines prohibiting unlawful ads and create a data trail that would make it easier for law enforcement to identify persons who misuse the service in furtherance of unlawful activity. (Compl. ¶ 23.)

throughout the website. Designating a separate category for such lawful ads has multiple advantages. It helps insulate members of the community who do not wish to see such ads. It also allows craigslist to target special measures at persons who post such ads, in order to deter them from crossing the line between legal and illegal content. (*Id.* ¶ 30.) Newspaper classifieds, telephone yellow pages, and other print media routinely organize adult-oriented ads within similar categories, and have done so for decades. (*Id.* ¶ 31.)

Voluntary Measures to Combat Illegal Activity in the Erotic Subcategory

Over time, craigslist adopted a variety of special measures to deter users from posting to the erotic category ads that violate craigslist's Terms of Use, including ads soliciting prostitution. One such measure was a detailed warning screen displayed to any user seeking entry to that category. This warning screen required the user to acknowledge that craigslist's terms of use "prohibit[]" posting "anything illegal or in violation of craigslist terms of use. This includes, but is not limited to, offers for or the solicitation of prostitution." (*Id.* ¶ 33 & Ex. B.)

In addition, before posting any ad to the erotic category, users first had to affirmatively agree to a special set of posting guidelines that included the following text:

> **YOU MUST OBSERVE THE FOLLOWING GUIDELINES WHEN POSTING IN EROTIC SERVICES. . . . .**
>
> 1. **"Erotic Services," like all categories on craigslist, may be used only for advertising LEGAL services.**
>
> When using craigslist, you agree to abide by the craigslist Terms of Use, which forbid posting, emailing or otherwise making available content that is unlawful, obscene, or which advertises illegal services.
>
> 2. **Do NOT suggest or imply an exchange of sexual favors for money — ads that do so are subject to removal without refund[.] . . .**
>
> 4. **Do NOT include obscene images with your posting — ads containing obscene images are subject to removal without refund.**
>
> If you're not sure whether or not a particular image is obscene, do not post it.
>
> **If you are unable to follow these guidelines, do not post on craigslist.**
>
> Ads in violation of our Terms of Use or these guidelines are subject to removal without refund.

> craigslist may supply information about your identity to law enforcement officers in response to legal subpoena.
>
> I have read these guidelines and will abide by them — proceed with erotic services.

(*Id.* ¶ 36 & Ex. C.) As provided in the Terms of Use, craigslist regularly supplies information to, and otherwise assists, law enforcement agencies in apprehending wrongdoers. (*Id.* ¶¶ 37, 45.)

Since early 2008, craigslist engaged in cooperative consultations with State attorneys general and other local law enforcement officials, including Mr. McMaster, about potential additional measures to further deter misuse of craigslist for advertising unlawful activities. During such consultations, craigslist consistently reaffirmed its focus on minimizing such misuse and its continuing commitment to provide law enforcement agencies (upon appropriate request) with information to assist in their investigations of any persons engaged in such misuse. (*Id.* ¶ 37.) In November 2008, growing out of such discussions, craigslist voluntarily implemented additional measures to deter posting of problematic ads in the erotic services subcategory. The measures were announced in a joint public statement signed by craigslist, 40 State attorneys general (including Mr. McMaster) and the National Center for Missing and Exploited Children ("NCMEC"). (*Id.* ¶ 38 & Ex. D.) These additional measures included:

- Before posting in the erotic subcategory, all users must provide a working phone number as a form of self-identification. craigslist retained such numbers so it could (i) block subsequent postings by such users if found to have violated the Terms of Use, and (ii) provide them to law enforcement personnel (pursuant to proper legal process).
- craigslist imposed a requirement that users submit a valid credit card credential to pay a $5 fee to post in the erotic category. Again, craigslist kept this information so that it could be made available for law enforcement purposes.
- craigslist implemented electronic filtering systems designed to identify and block inappropriate postings to the erotic subcategory.

(*Id.* ¶ 39.)

Further Changes to the craigslist Website in May 2009

On May 12, 2009, craigslist voluntarily took still further — and even more aggressive —

steps to deter misuse of its website by persons engaged in unlawful activity. It immediately stopped accepting new postings to the erotic services category on all U.S.-directed portions of its website and announced that that category would permanently close seven days later. (*Id.* ¶ 43.) Simultaneously, craigslist opened a new services category called "adult." For this new category, craigslist employs nearly all of the special deterrent measures it previously used for the erotic services subcategory (including special warnings, automatic filtering mechanisms, telephone verification, and credit card payment/verification). It also adopted (and continues to employ) an additional measure that is both labor intensive and highly unusual (if not unprecedented) for a high-volume online service such as craigslist: to better assure compliance with craigslist's guidelines and Terms of Use, each proposed posting to the adult services category is manually examined by a trained, human reviewer before it can reach the website. (*Id.* ¶ 43.)

Defendant McMaster's Public Threats to Prosecute craigslist

Starting in Spring 2009, Attorney General McMaster issued a series of public and direct threats to prosecute craigslist and its management based on the alleged occurrence of ads soliciting prostitution and/or containing pornographic images on the craigslist website. (Compl. ¶ 5.) On May 5, 2009, Mr. McMaster held a press conference at which he threatened craigslist with criminal investigation and prosecution unless craigslist made it impossible for users of its South Carolina-directed sites to post such ads. (*Id.* ¶ 46.) That same day, Mr. McMaster prominently published on his office's official website an open letter to craigslist's CEO and a press release, each expanding on his threat. (*Id.* ¶ 47.) The open letter stated:

> [P]lease be advised that the craigslist management may be subject to criminal investigation and prosecution by this office if the portions of [craigslist's] site dedicated to South Carolina and its municipal regions and which contain categories for and functions allowing for the solicitation of prostitution and the dissemination and posting of graphic pornographic material are not permanently removed on or before 5:00pm EST, the close of business Friday, May 15, 2009.

(*Id.* ¶ 48 & Ex. E.) Over the next week, McMaster continued — and escalated — his public threats. For example, on May 6, *The State* newspaper reported that "[McMaster] threatened Tuesday to charge Craigslist's chief executive, contending the popular Internet classified ad service company hasn't done enough to stop solicitation for prosecution and obscenity on its Web site." The article also reported that McMaster had stated he will seek to charge craigslist's CEO and other company officials under state prostitution or obscenity laws. (*Id.* ¶ 49 & Ex. F.)

On May 13, 2009, a craigslist lawyer met with McMaster's aides to describe the additional voluntary measures craigslist had implemented the previous day — including closure of the erotic services category and introduction of manual advance review for the new adult services category. craigslist's lawyer also explained that federal law, including Section 230 and the First Amendment, shield craigslist from precisely the sort of prosecution being threatened. (*Id.* ¶ 50.) Nonetheless, later that same day, *The State* reported that Mr. McMaster had just declared he will not withdraw his "threat of criminal prosecution." (*Id.* ¶ 51 & Ex. G.)

On May 14, craigslist's counsel delivered to Mr. McMaster a letter detailing both the additional deterrent measures it had undertaken and the legal principles barring the threatened prosecution. (*Id.* ¶ 52 & Ex. H.) The next day, a McMaster subordinate wrote back, expressing concern about "the facilitation of prostitution in South Carolina" but assuring craigslist that "[p]rior to any prosecution in which this office is involved, you will certainly be allowed a reasonable opportunity to respond." (*Id.* ¶ 53 & Ex. I.) Just a few hours later, despite the assurances of the letter, Mr. McMaster issued the following announcement:

> As of 5:00 p.m. this afternoon, the craigslist South Carolina site continues to display advertisements for prostitution and graphic pornographic material. This content was not removed as we requested. We have no alternative but to move forward with criminal investigation and potential prosecution.

(*Id.* ¶ 54 & Ex. J.)

On May 16, 2009, *The State* reported: "Attorney General Henry McMaster has launched his own investigation of Craigslist for possible prostitution and pornography as his own deadline to block such classified ads passed Friday afternoon. 'We will have an active investigation in the office into Craigslist,' McMaster said. 'This content was not removed as we requested. We have no alternative.'" The article further reported that McMaster "cited aiding and abetting prostitution, obscenity and conspiracy as possible offenses. Craigslist executives could be tried in their absence and face extradition to South Carolina after a third offense of aiding in prostitution." (Compl. ¶ 56 & Ex. L.) Over the next few days, Mr. McMaster continued his public threats in televised interviews and statements to the national press. (*Id.* ¶¶ 57-59 & Ex. M.)

craigslist's Untenable Choice

As a practical matter, the only way for craigslist to assure compliance with Mr. McMaster's public demand that it eliminate all "functions" and "categories" that enable third parties to post ads containing potentially illegal material would be to shut down completely all portions of its South Carolina sites. (*Id.* ¶ 60.) The architecture of the craigslist website is open and accessible to every person who is connected to the internet. It is this very openness and accessibility that makes the craigslist service so popular and useful. This same openness and accessibility, however, also enables virtually anyone, inside or outside of South Carolina, to post any sort of ad to any category on craigslist's South Carolina sites (other than to the new adult services category, which is subject to manual review). (*Id.* ¶ 61.) craigslist's many measures to deter problematic postings, while quite effective, are imperfect — for example, electronic filters may be circumvented using non-conventional characters or formatting.

Faced with the untenable choice of *either* shutting down completely all of its South Carolina-directed sites, which many of this State's citizens routinely and lawfully use to meet all kinds of everyday needs, or else putting itself and its management at risk of criminal prosecution brought in violation of its fundamental federal rights, craigslist determined that its only avenue for relief was to file the present lawsuit. (*Id.* ¶ 63.)

ARGUMENT

I. *YOUNGER* ABSTENTION IS INAPPLICABLE.

Defendants erroneously contend that *Younger v. Harris*, 401 U.S. 37 (1971), requires this Court to refrain from adjudicating violations of craigslist's federal statutory and constitutional rights. Their contention is based on the extraordinary claim that *Younger* requires federal courts to abstain from hearing claims of interference with federally-protected rights whenever state officials say they have "formally initiated" a criminal investigation. (Def. Mem. at 11.) *Younger* requires nothing of the sort, but rather is triggered only where "federal claims have been or could be presented in ongoing state *judicial* proceedings that concern important state interests." *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 237-38 (1984) (emphasis added). Moreover, Defendants' reading of *Younger* is inconsistent with the long-established role of federal courts in protecting federal rights where a "plaintiff demonstrates a genuine threat of enforcement of a disputed state criminal statute, whether an attack is made on the constitutionality of the statute on its face or as applied." *Steffel v. Thompson*, 415 U.S. 452, 475 (1974).

Younger abstention "is the exception, not the rule," *Employers Resource Mgmt. Co., Inc. v. Shannon*, 65 F.3d 1126, 1134 (4th Cir. 1995) (quoting *Midkiff*, 467 U.S. at 236), and applies only where three requirements are met: there must be (1) "an ongoing state judicial proceeding," (2) that "implicates important state interests," and (3) provides "an adequate opportunity to present the federal claims." *Shannon*, 65 F.3d at 1134-35 (citing *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982)). Critical to *Younger* abstention is the existence of a state proceeding that is judicial (or judicial in nature) in which the plaintiff's federal-law claims can be adequately presented. As the Fourth Circuit has explained, if there is such a state proceeding, "reinstituting the action in the federal courts ... would involve a loss of time and duplication of effort," *Telco Comm., Inc. v. Carbaugh*, 885 F.2d 1225, 1228 (4th Cir. 1989) (internal quotation marks omitted), and principles of "comity" require the federal courts to stay their hand, *see Middlesex County*, 457 U.S. at 431. But if no such state judicial (or other "trial-like") proceeding is pending, the federal courts remain open for a party challenging applications of state law that violate federal rights. *See Telco*, 885 F.2d at 1228. The reason is straightforward: to decline to adjudicate federal rights where no state judicial proceeding is ongoing would leave a plaintiff "between the Scylla of intentionally flouting state law and the Charybdis of forgoing what he believes to be constitutionally protected activity in order to avoid becoming enmeshed in a criminal proceeding." *Steffel*, 415 U.S. at 462.[2]

Defendants correctly identify the basic requirements of *Younger* — but then promptly discard them in arguing that the requirements are satisfied by McMaster's announcement that he "formally initiated his criminal investigation." (*See* Def. Mem. at 11.) This "formal" investigation — whatever that could mean — clearly does not constitute the kind of *judicial* or *trial-like* proceeding that is necessary to trigger *Younger* abstention. Nothing about it resembles a trial in any sense of the word: the "formal" investigation offers Plaintiff no opportunity to present *any* challenge — constitutional or otherwise — to Mr. McMaster's threatened prosecution. Indeed, for all the Defendants have revealed, this "formal" investigation may amount to nothing

[2] In addition, for Younger abstention to apply, the state judicial proceeding must be instituted "before any proceedings of substance on the merits have taken place in the federal court." *Hicks v. Miranda*, 422 U.S. 332, 349 (1976). There have already been significant proceedings regarding craigslist's claims in this Court, and in light of this Court's injunction, there is no prospect of the Defendants initiating a state judicial proceeding "[u]ntil the Court rules on the *merits* of craigslist's claims." Consent Order, at 2 (May 22, 2009) (emphasis added). Indeed, the very fact that Defendants *consented* to the Court's injunction underscores that *Younger* principles are not in play in this case.

more than Mr. McMaster's public issuance of his May 15 letter. If that were enough to trigger *Younger* abstention, it would be hard to see how *any* plaintiff threatened with an unlawful state prosecution could *ever* have a federal court hear his federal claims. The State could simply "formal[ize]" its threat by issuing a press release, cut off the federal forum, and "leave a party's constitutional rights in limbo while [it] contemplates enforcement but does not undertake it." *Telco*, 885 F.2d at 1229. A plaintiff engaged in constitutionally protected activity would have little choice but to cease his conduct and await the state's determination of his fate — a determination that may never come. That would clearly be intolerable. *See Steffel*, 415 U.S. at 462. Defendants' argument is simply inconsistent with federal courts' established practice of hearing pre-enforcement challenges to unconstitutional applications of state criminal laws.

None of the cases Defendants cite is contrary to these settled principles. Indeed, Defendants do not cite a single case in which the mere existence of a criminal investigation barred a plaintiff from obtaining federal court adjudication of its federal rights, or in which a plaintiff was required to cease constitutionally protected activity and wait to have its federal rights adjudicated in a state prosecution that might never come. *See, e.g.*, *Fieger v. Cox*, 524 F.3d 770, 775 (6th Cir. 2008) (plaintiffs could have sought to quash state-court issued search warrants and subpoena and to raise constitutional issues through the state appeals process; also, plaintiffs were engaged in ongoing state appeals court proceeding challenging the lawfulness of defendants' acts); *Nivens v. Gilchrist*, 444 F.3d 237, 240 (4th Cir. 2006) (plaintiffs were under criminal indictment); *Texas Ass'n of Bus. v. Earle*, 388 F.3d 515, 517 (5th Cir. 2004) (grand jury proceeding in which subpoenas had been issued; federal plaintiff had already litigated his federal claims in state trial and appellate courts); *Amanatullah v. Colo. Bd. of Med. Examiners*, 187 F.3d 1160, 1163 (10th Cir. 1999) (state medical licensing board had already initiated disciplinary proceedings against federal plaintiff, who had already submitted two responses to notices from the board; plaintiff could present his federal claims in pending state administrative proceeding); *Berger v. Cuyahoga County Bar Ass'n*, 983 F.2d 718, 720 (6th Cir. 1993) (formal state bar disciplinary proceedings against federal plaintiff); *Craig v. Barney*, 678 F.2d 1200, 1202 (4th Cir. 1982) (plaintiffs had opportunity to challenge grand jury subpoenas in state court); *Kaylor v. Fields*, 661 F.2d 1177, 1182 (8th Cir. 1981) (plaintiffs could challenge prosecutor's subpoenas in state court); *J & W Seligman & Co. Inc. v. Spitzer*, No. 05 Civ. 7781, 2007 WL 2822208, at *6-7 (S.D.N.Y Sept. 7, 2007) (same); *Nick v. Abrams*, 717 F. Supp. 1053, 1057 (S.D.N.Y 1989) (same, with respect to search warrants).[3]

Likewise, neither of the Fourth Circuit cases on which Defendants principally rely supports *Younger* abstention here. *See Traverso v. Penn*, 874 F.2d 209 (4th Cir. 1989); *Potomac Elec. Power Co. v. Sachs*, 802 F.2d 1527 (4th Cir. 1986), *vacated on other grounds*, 484 U.S. 1022 (1988). *Traverso* concerned a § 1983 suit brought by a Virginia prisoner against police officers who had investigated the murder for which the plaintiff had been convicted. While the § 1983 action was on appeal in the Fourth Circuit, Virginia courts vacated the plaintiff's conviction on the ground that venue for the murder prosecution properly lay in Maryland. The Fourth Circuit was advised on appeal that a Maryland state prosecution was "imminent or underway," and therefore abstained from hearing the appeal "[b]ased on the narrow circumstances of this case, where we assume that reprosecution in Maryland courts is now pending." 874 F.2d at 213 n.4. Those "narrow" circumstances — which involved a certain, or near-certain, prosecution

[3] Still other cases cited by Defendants are even further afield. *North v. Walsh*, 656 F. Supp. 414 (D.D.C. 1987) involved a federal suit seeking to enjoin a *federal* prosecution; although the court happened to cite *Younger* on the general standard for injunctions, it made no mention whatsoever of the *Younger* abstention doctrine, which is hardly surprising given the obvious inapplicability of the doctrine in that context. *Morales v. Trans World Airlines*, 504 U.S. 374 (1982) explicitly declined to address *Younger* abstention. *Id.* at 381 & n.1. And *Cameron v. Johnson*, 390 U.S. 611 (1968), which Defendants erroneously portray as "applying *Younger*" (Def. Mem. at 7), was actually decided several years *before Younger*. In any event, the Supreme Court later explained that its holding in *Cameron* applied only where state "prosecutions were already pending." *Steffel,* 415 U.S. at 474.

for a single past act — have little relevance to the circumstances of this case, in which craigslist seeks, in the face of Mr. McMaster's announcement of a "formal investigation," to have a federal court adjudicate its federal rights to engage in ongoing conduct. The same is true of *Sachs*, in which a plaintiff sued in federal court to enjoin an indictment, expected to be issued "imminent[ly]" by an already-empanelled state grand jury, relating solely to the plaintiff's *past* conduct. 802 F.2d at 1529 n.5. Unlike craigslist, the plaintiff in *Sachs* was not put in limbo as to the lawfulness of its *ongoing* conduct. Moreover, in *Sachs*, the Fourth Circuit clearly determined that grand juries in Maryland "operate under the auspices of the judicial branch" and are "part of the judicial process." 802 F.2d at 1531 n.8. By contrast, McMaster's announcement of a "formal" investigation into craigslist clearly was not part of a judicial proceeding.[4]

In short, there is no precedent for Defendants' assertion that *Younger* abstention applies in this case. There is no ongoing state proceeding in which craigslist can have the lawfulness of its conduct adjudicated in light of its federal claims, and yet, the Attorney General's "formal" threat of prosecution still hangs over craigslist's head. This is *precisely* the circumstance in which pre-enforcement review of federal claims is required. *See Steffel*, 415 U.S. at 462.[5]

[4] Defendants' contention that under South Carolina law, "criminal investigation is part and parcel of the *prosecution* process," (Def. Mem. at 11 (emphasis added)), is irrelevant to whether the investigation announced by McMaster is a *judicial* proceeding for *Younger* purposes.

[5] Defendants' cursory argument (Def. Mem. at 13 n.4) for abstention under *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), is also unfounded. *Burford* abstention "represents an extraordinary and narrow exception to the duty of the District Court to adjudicate a controversy properly before it," *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 727-28 (1996), and generally applies only where a federal court is required to decide difficult questions of *state* law for which the State has a special interest in ensuring a uniform administrative or regulatory regime. *See New Orleans Pub. Serv. Inc. v. Council of City of New Orleans*, 491 U.S. 350, 361 (1989) (declining to abstain where the "case does not involve a state-law claim, nor even an assertion that the federal claims are in any way entangled in a skein of state law that must be untangled before the federal case can proceed"). The present case does not require the Court to decide *any state* law question, much less one implicating a state regulatory or administrative regime for which there is a special need for uniformity. Defendants' bald assertion that federal court adjudication of craigslist's federal claims would be "disruptive" to an "important state policy of deterring prostitution" is inadequate. If such self-serving claims were deemed sufficient to mandate abstention, the federal courts would be closed to nearly all claims of violations of federal statutory and constitutional rights by state officials, contrary to legions of Supreme Court precedent.

II. CRAIGSLIST HAS STATED AN ACTIONABLE CLAIM FOR RELIEF FROM DEFENDANTS' THREATENED VIOLATIONS OF SECTION 230.

Under the plain language of Section 230, craigslist may not be held criminally or civilly liable under State law for allegedly unlawful content posted to its website by third parties. This is confirmed by the Fourth Circuit's seminal decision interpreting Section 230, *Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir. 1997) (Wilkinson, C.J.), *cert. denied*, 524 U.S. 937 (1998), and a Seventh Circuit case specifically holding that *craigslist itself* is entitled to Section 230 protection with respect to liability based on ads posted by third parties, *see Chicago Lawyers' Comm. for Civil Rights Under Law, Inc. v. craigslist, Inc.*, 519 F.3d 666 (7th Cir. 2008) ("*CLC*"). Because Defendants' threatened prosecution of craigslist is based entirely on the presence of allegedly unlawful third-party ads on craigslist's website, it is barred by federal law.

A. Section 230 Immunizes Service Providers Such as craigslist from Liability for Third-Party Content.

The key operative provision of Section 230 states that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1). Section 230 further provides that "No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." *Id.* § 230(e)(3).

In the first appellate decision construing Section 230, the Fourth Circuit held that Section 230 "plainly immunizes computer service providers . . . from liability for information that originates with third parties." *Zeran*, 129 F.3d at 328. Courts across the country have uniformly followed *Zeran*'s construction of the statute, leading to a "consensus developing across other courts of appeal that § 230(c) provides broad immunity for publishing content provided primarily by third parties." *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1123 (9th Cir. 2003); *see also Doe v. MySpace, Inc.*, 528 F.3d 413 (5th Cir. 2008); *Green v. America Online,* 318 F.3d 465

(3d Cir. 2003); *Ben Ezra, Weinstein, & Co. v. America Online, Inc.*, 206 F.3d 980 (10th Cir. 2000); *Universal Comm. Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413 (1st Cir. 2007); *Fair Housing Council v. Roommates.com,* 521 F.3d 1157 (9th Cir. 2008) (en banc).

Countless federal district courts and State appellate and trial-level courts likewise have concluded that Section 230 broadly immunizes providers of interactive computer services from liability for the dissemination of third-party content.[6] Congress itself, in enacting legislation extending the reach of Section 230 to a new category of service providers, explicitly observed that "[t]he courts have correctly interpreted section 230(c)." H.R. Rep. No. 107-449, at 13 (2002) (specifically endorsing *Zeran* and its progeny).

The Seventh Circuit recently joined this judicial consensus in *CLC*, in which it specifically held that Section 230 barred craigslist from being held liable for its users' allegedly unlawful postings. The plaintiff in *CLC* sued craigslist under the Fair Housing Act for allegedly discriminatory housing ads posted by craigslist users. In affirming dismissal of the case, the Seventh Circuit recognized that requiring craigslist to review each and every ad posted on its service, such as the plaintiff demanded in that case and Defendants effectively demand here, is neither practical nor effective. 519 F.3d at 669. In an analysis directly applicable to the present case, the Seventh Circuit rejected CLC's argument that craigslist should be held liable for causing the unlawful postings:

> Doubtless craigslist plays a causal role in the sense that no one could post a discriminatory ad if craigslist did not offer a forum. That is not, however, a useful definition of cause. One might as well say that people who save money "cause" bank robbery, because if there were no banks there could be no bank robberies.

[6] *See, e.g.*, *Goddard v. Google, Inc.*, No. C 08-2738, 2008 WL 5245490 (N.D. Cal. Dec. 17, 2008); *Whitney Info. Network, Inc., v. XCentric Ventures, LLC*, No. 04-cv-47, 2008 WL 450095 (M.D. Fla. Feb. 15, 2008); *Noah v. AOL Time Warner Inc.*, 261 F. Supp. 2d 532 (E.D. Va. 2003), *aff'd*, No. 03-1770, 2004 WL 602711 (4th Cir. Mar. 24, 2004) (*per curiam*); *Blumenthal v. Drudge*, 992 F. Supp. 44, 49 (D.D.C. 1998); *Barrett v. Rosenthal*, 146 P.3d 510, 515-29 (Cal. 2006); *Doe v. America Online, Inc.*, 783 So.2d 1010, 1013-17 (Fla. 2001), *cert. denied*, 534 U.S. 891 (2001).

> An interactive computer service "causes" postings only in the sense of providing a place where people can post. Causation in a statute such as [the Fair Housing Act] must refer to causing a particular statement to be made, or perhaps the discriminatory content of a statement. That's the sense in which a non-publisher can cause a discriminatory ad, while one who causes the forbidden content may not be a publisher. Nothing in the service craigslist offers induces anyone to post any particular listing or express a preference for discrimination; . . . . If craigslist "causes" the discriminatory notices, then so do phone companies and courier services (and, for that matter, the firms that make the computers and software that owners use to post their notices online), yet no one could think that Microsoft and Dell are liable for "causing" discriminatory advertisements.

Id. at 671-72. The Seventh Circuit thus held that "given § 230(c)(1) [the plaintiff] cannot sue the messenger just because the message reveals a third party's plan to engage in unlawful [conduct]." *Id.* at 672. The same conclusion applies here. *See also Roommates.com,* 521 F.3d. 1172 n.33 (citing *CLC* with approval and explaining that "nothing in the service craigslist offers induces anyone to post any particular listing."); *Gibson v. craigslist, Inc.*, No. 08 Civ. 7735, 2009 WL 1704355 at **3-4 (S.D.N.Y. June 15, 2009) (Section 230 required dismissing suit against craigslist for allegedly unlawful gun ad).

B. The Complaint Satisfies the Three Elements for Section 230 Immunity.

Section 230 immunity applies whenever (1) the defendant claiming immunity is "a provider ... of an interactive computer service," (2) the legal action at issue seeks to "treat[]" the defendant as the "publisher or speaker" of that information, and (3) the allegedly unlawful information was "provided by another information content provider." 47 U.S.C. § 230(c)(1); *see generally Ben Ezra*, 206 F.3d at 984-85; *Lycos, Inc.*, 478 F.3d at 418. Defendants do not contest that the first two elements are met here, and their argument that the third element is unsatisfied because (contrary to the allegations of the Complaint) craigslist itself plays a role in providing the ads posted by its users is meritless.

First, Defendants do not dispute that craigslist is a "provider" of an "interactive computer service." Under Section 230, an "interactive computer service" means "*any* information service, system, or access software provider that provides or enables computer access by multiple users to a computer server." 47 U.S.C. § 230(f)(2) (emphasis added). craigslist is a provider of an interactive computer service, because it "provides or enables computer access by multiple users to a computer server" — in this case, to its servers containing the indexed database of postings. *See, e.g., CLC,* 519 F.3d at 671.

Second, Defendants likewise do not dispute that their threatened or actual prosecution of craigslist would "treat" craigslist as a "publisher or speaker" within the meaning of Section 230(c)(1). Defendants assert that their threatened prosecution of craigslist would hold it "criminally responsible for aiding a crime by *publishing the activity.*" (Def. Mem. at 21.) And they admit that such a prosecution would hold craigslist liable for its alleged failure to regulate content on its website. *See, e.g., id.*. at 4 (describing demand from Attorney General that craigslist "remove offending advertisements"); *id.* at 20 (contending craigslist could be prosecuted for "allowing the continued use of its websites to advertise prostitution"). As Chief Judge Wilkinson explained in *Zeran*, "hold[ing] a service provider liable for its exercise of a publisher's traditional editorial functions — such as deciding whether to publish, withdraw, postpone or alter content" necessarily would "treat[]" the defendant as a "publisher" of that content and therefore is "barred." *Zeran*, 129 F.3d at 330, 333; *Green*, 318 F.3d at 471 (any claim that a service provider "promulgat[ed] harmful content" and "fail[ed] to address certain harmful content" pertains to "decisions relating to the monitoring, screening, and deletion of content from its network — actions quintessentially related to a publisher's role"); *Ben Ezra*, 206 F.3d at 986.

Third, all of the content appearing on the craigslist website that would be the subject of Defendant's threatened prosecution was created and developed by third parties and therefore constitutes "information provided by another information content provider" within the meaning of 47 U.S.C. § 230(c)(1). Section 230 defines "information content provider" as "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service." 47 U.S.C. § 230(f)(3). Under these provisions, the critical question is whether craigslist created or developed the particular content alleged to be unlawful — that is, the advertisements that allegedly solicited prostitution. *See, e.g., Carafano*, 339 F.3d at 1125. The Complaint specifically alleges that craigslist played no role whatsoever in creating or developing the ads at issue. (Compl. ¶¶ 21, 60-61.) This is hardly surprising, as user-generated ads are the paradigm of third-party content to which Section 230 applies. *See, e.g., Zeran*, 129 F.3d at 330-31 (defamatory ad posted by third-party user); *CLC*, 519 F.3d at 671-72 (allegedly unlawful housing ads posted on craigslist site); *Gibson*, 2009 WL 1704355 at **3-4 (allegedly unlawful gun ad posted on craigslist site).

Defendants nevertheless contend that craigslist's delineation of an "erotic services" category of the website somehow renders craigslist an "information content provider" for the ads its users post there. (Def. Mem. at 21-22.) But several courts have already squarely rejected the theory that merely making available categories that users may select to classify the subject of their content means that a service provider has a role in creating or developing that content. For example, in *Whitney Information Network*, the court rebuffed the argument that the defendants were responsible for the creation or development of defamatory posts on their websites because defendants "created *categories*, such as 'con artists', 'corrupt companies' and 'fake TV advertisements', from which a poster must make a selection to categorize his or her report as part of the submission process." *Whitney Info. Network*, 2008 WL 450095. at *10; *see also Gentry v. Ebay*, 99 Cal. App. 4th 816, 820-23, 831-32 (2002) (rejecting argument that, because eBay provides descriptive categories into which users post ads, eBay is not entitled to § 230 protection); *Doe IX v. MySpace, Inc.*, No. 4:08-CV-140, 2009 WL 1457170, at *2 (E.D. Tex. May 22, 2009); *Global Royalties, Ltd. v. Xcentric Ventures LLC,* 544 F. Supp. 2d 929, 932-33 (D. Ariz. 2008).

As these courts have recognized, providing users categories into which they can place ads, profiles, or other similar information does not make a service provider responsible for the creation of that information. That is particularly so where, as here, the categories in question can be used for lawful content and any choice to post unlawful content is made solely by the user. A category titled "erotic" (or "adult") services readily encompasses a wide variety of lawful activities, such as escort services, exotic dancing, massage services, erotic photography and videography, phone chat lines, webcams, and texting services. Moreover, craigslist prominently warns and instructs its users that its categories are *not* intended for the posting of ads for unlawful activities, including unlawful prostitution, insists that its users affirmatively agree not to post such advertisements, and actively takes other steps to deter, block and remove such ads. (Compl. ¶¶ 33-44.). Thus, this is a case in which the allegedly unlawful "posting was contrary to the website's express policies" and falls squarely within Section 230 immunity. *See Roommates*.com, 521 F.3d at 1171. As the Seventh Circuit explained in finding craigslist immune in *CLC,* in language equally applicable here, "[n]othing in the service craigslist offers induces anyone to post any particular listing or express a preference for [unlawful activity]; for example, craigslist does not offer a lower price to people who include [unlawful] statements in their postings." *CLC*, 519 F.3d at 671-72.[7]

C. Section 230 Applies Even If the Third-Party Content Allegedly Violates State Criminal Law.

Defendants repeatedly assert that Section 230 does not apply here because this case

[7] For this reason, *Federal Trade Comm'n v. Accusearch, Inc.*, 570 F.3d 1187 (10th Cir. 2009), on which Defendants rely (Def. Mem. at 21-22), is wholly inapposite. In that case, the court held that a website that allowed users to purchase third-parties' telephone records that were "*almost inevitably*" obtained unlawfully could not rely on Section 230 immunity. 570 F.3d at 1192, 1197-1201 (emphasis added). As the court explained, "[b]y paying its researchers to acquire telephone records, knowing that the confidentiality of the records was protected by law, it contributed mightily to the unlawful conduct of its researchers. . . . [T]he offensive postings were Accusearch's *raison d'etre* and it affirmatively solicited them." *Id.* at 1200. Here, by contrast, craigslist does not "affirmatively solicit[]" unlawful ads but rather makes clear they are prohibited and actively deters them.

involves a threatened state *criminal* prosecution. (Def. Mem. at 14-23.) Yet, as Defendants acknowledge (*id.* at 22-23), each court to consider the question has held that Section 230 applies to preclude criminal prosecutions under state laws when such a prosecution would be inconsistent with Section 230. *See Voicenet Comm., Inc. v. Corbett*, No. 04-cv-1318, 2006 WL 2506318, at *4 (E.D.Pa. Aug. 30, 2006) ("the plain language of the CDA provides internet service providers immunity from inconsistent state criminal laws"); *People v. Gourlay*, No. 278214, 2009 WL 529216, at *3 (Mich. App. Mar. 3, 2009) ("Congress intended that no liability may be imposed under a state criminal law that is inconsistent with § 230"). *See also Doe v. America Online, Inc.*, 783 So.2d at 1018 (holding online intermediary immune from civil claims that were premised on State criminal statutes).

As these decisions recognize, the plain language of the statute demonstrates that Section 230 applies equally to state civil and criminal laws when application of those laws would be inconsistent with Section 230:

> Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. *No cause of action may be brought and no liability may be imposed under* ***any*** *State or local law that is inconsistent with this section.*

47 U.S.C. § 230(e)(3) (emphases added).

Congress's use of the term "any" to define the scope of the immunity it conferred through Section 230 demonstrates its intent to apply that immunity in connection with all State laws, including criminal laws. "In interpreting statutory language, words are generally given their common and ordinary meaning." *Mapoy v. Carroll*, 185 F.3d 224, 229 (4th Cir. 1999). The word "'any' is a term of great breadth." *U. S. v. Wildes,* 120 F.3d 468, 470 (4th Cir. 1997). The Fourth Circuit has interpreted "any" to mean "all." *Mapoy*, 185 F.3d at 229. "Accordingly, the phrase 'any State or local law' includes civil and criminal laws." *Gourlay*, 2009 WL 529216, at *3.

The fact that Section 230 immunity protects online intermediaries like craigslist from criminal prosecution under State law is further confirmed by the statute's inclusion of an express exception for enforcement of *federal* criminal statutes. Subsection 230(e)(1) provides that nothing in Section 230 "shall be construed to impair the enforcement" of certain federal statutes governing obscenity and the sexual exploitation of children, "or any other *Federal* criminal statute." 47 U.S.C. § 230(e)(1) (emphasis added). In other words, subsection (e)(1) states that only prosecutions under *federal* criminal statutes will trump Section 230, and the statute contains no comparable exception for enforcement of state criminal laws. The inclusion of an exception for Federal statutes reflects Congress' understanding that, absent such an exception, Section 230 generally extends to liability under criminal statutes. By the same token, under the principle of *expressio unius est exclusio alterius*, the express listing of certain exceptions implies the absence of any other. *See, e.g., Ayes v. U.S. Dept. of Veterans Affairs*, 473 F.3d 104, 110-11 (4th Cir. 2006). Moreover, statutes should be interpreted to give effect, if possible, to every clause and word. *Duncan v. Walker,* 533 U.S. 167, 174 (2001) (internal quotations omitted). To interpret Section 230 as inapplicable to all criminal laws would render the word "Federal" in subsection (e)(1) superfluous, in violation of this rule of statutory interpretation. *Voicenet*, 2006 WL 2506318, at *4.[8]

Defendants' attempts to evade the plain language of Section 230 fall well short. They point to language in the statute's preamble stating a national policy of "vigorous enforcement of *Federal* criminal laws to deter and punish trafficking in obscenity, stalking and harassment by means of computer," 47 U.S.C. § 230(b)(5) (emphasis added), and suggest that provision reflects an intent to

[8] Of course, if Congress had wanted to exempt State criminal statutes from Section 230, it knew how to do so. For example, subsection (e)(2) provides that nothing in Section 230 shall be construed to limit or expand "*any* law pertaining to intellectual property." 47 U.S.C. § 230(e)(2) (emphasis added). Subsection (e)(4) provides that nothing in Section 230 shall be construed to limit the application of the ECPA "or *any similar State law.*" 47 U.S.C. § 230(e)(4) (emphasis added). When Congress includes particular language in one provision of a statute but omits it in another, courts generally presume that Congress acted intentionally and purposefully. *Duncan,* 533 U.S. at 173 (internal quotations omitted).

allow the enforcement of "any state law that is consistent with, and complementary to, enforcement of federal criminal laws." (Def. Mem. at 17.) But the use of the term "Federal" in that statement in the preamble only reinforces what is apparent from the plain language of the operative portion of the statute: that Section 230 contains an exception for *federal* — but not state — criminal prosecutions. The Court should decline Defendants' invitation to rewrite Section 230.[9]

This Court should likewise reject Defendants' general assertions that "basic federalism considerations" require this Court to refuse to apply the plain language of Section 230. (Def. Mem. at 14-16.) Where Congressional intent to preempt inconsistent state laws is "clear and manifest," *Anderson v. Sara Lee Corp.*, 508 F.3d 181, 192 (4th Cir. 2007), the plain meaning must control. As discussed above, in terms that could not be clearer, Section 230(e)(3) manifests an intent to preempt liability under "any State or local law that is inconsistent with this section." As the Fourth Circuit explained in *Zeran* in rejecting a similar argument that Section 230 should not be interpreted to preempt state common law principles:

> With respect to federal-state preemption, the Court has advised: "[W]hen Congress has 'unmistakably ... ordained,' that its enactments alone are to regulate a part of commerce, state laws regulating that aspect of commerce must fall. The result is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." Here, Congress' command is explicitly stated. Its exercise of its commerce power is clear and counteracts the caution counseled by the interpretive canon favoring retention of common law principles.

129 F.3d at 334 (citation omitted). Section 230 is equally clear with respect to preemption of state

[9] Defendants further err in arguing that references in the legislative history to protections from "civil liability" demonstrate that Section 230 does not extend to criminal prosecutions. (Def. Mem. at 17-18.) Those references merely describe an impetus for the enactment of Section 230 – namely, a case in which an interactive computer service had been held civilly liable because of actions it took to block offensive content. *See* H.R. Rep. 104-459, at 194 (1996) (citing *Stratton Oakmont v. Prodigy*). As the Seventh Circuit explained in *CLC*, "Section 230(c)(1) is general. Although the impetus for the enactment of § 230(c) as a whole was a court's opinion holding an information content provider liable, as a publisher, because it had exercised some selectivity with respect to the sexually oriented material it would host for customers, a law's scope often differs from its genesis." *CLC*, 519 F.3d at 671. Here, the plain language of Section 230 makes clear that it reaches state criminal liability.

criminal laws, and Defendants' suggestion that the Court ignore the statutory language in favor of general federalism concerns must be rejected.

D. Defendants' Resort to Section 230's Title and Heading and Supposed Purpose Provides Them No Support.

Defendants point to a few other indicators that they contend bring the threatened prosecution of craigslist outside the purpose of Section 230 immunity. (Def. Mem. at 17-20.) Here, again, their attempt is unavailing. As an initial matter, of course, where a statute's text is plain on its face, there is no need to consider statutory titles or headings, purposes, or other possible interpretive tools. *See, e.g., Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997) (when construing a statute, courts must first "determine whether the language at issue has a plain and unambiguous meaning"); *U.S. v. Buculei*, 262 F.3d 322, 331 (4th Cir. 2001) ("[I]t is important to recognize that 'the title of a statute cannot limit the plain meaning of the text.'"). As set forth above, the plain meaning of Section 230 – as confirmed by numerous judicial decisions, including *Zeran* – bars Defendants' threatened prosecution.

In any event, Defendants fail in their attempt to cobble together an argument that applying Section 230 here would be contrary to the purposes of the statute. Defendants suggest that the heading to Section 230(c) – "Protection for blocking and screening of offensive material" – and Congress' use of the term "Decency" in the CDA's title demonstrate that the "overall purpose of the CDA was to address the trafficking of offensive materials via the Internet" by eliminating liability for companies when they take "affirmative positive steps to block or screen objectionable materials." (Def. Mem. at 17-19.) To be sure, a purpose of Section 230 was to immunize interactive service providers from liability for good faith actions to block objectionable content. But an entirely *different* subsection of Section 230 – namely subsection (c)(2) – expressly provides such protection. Defendants' crabbed interpretation of the purpose of Section 230 would give subsection (c)(1) no effect at all, in contravention of basic canons of statutory construction.

In point of fact, the statute itself makes clear that its purposes are significantly broader than what Defendants posit. Congress enacted findings that the Internet and interactive computer services offer "a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity," 47 U.S.C. § 230(a)(3), and that such services "have flourished, to the benefit of all Americans, with a minimum of government regulation." *Id.* § 230(a)(4). Congress further stated that it is "the policy of the United States . . . to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, *unfettered by Federal or State regulation*." *Id.* § 230(b)(2) (emphasis added). As the Fourth Circuit summarized, Congress passed Section 230 "to maintain the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum." *Zeran*, 129 F.3d at 330.

The courts have repeatedly recognized that these congressional purposes support a broad reading of Section 230 immunity. The Ninth Circuit explained that "making interactive computer services and their users liable for the speech of third parties would severely restrict the information available on the Internet." *Batzel v. Smith*, 333 F.3d 1018, 1027 (9th Cir. 2003). Given the "staggering" volume of third-party content that they carry, and "[f]aced with potential liability for each message republished by their services," *Zeran,* 129 F.3d at 331, such services likely would be forced, absent § 230's protection, to restrict or abandon many of the features that enable the dissemination of third-party content. In short, § 230 was passed "to prevent lawsuits from shutting down websites and other services on the Internet." *Batzel,*333 F.3d at 1028.

Another key purpose of Section 230 was to encourage self-regulation on the part of service providers by eliminating disincentives to self-regulation that existed under pre-Section 230 law. Congress recognized that service providers could play a constructive role by engaging in self-regulatory efforts to restrict the availability of objectionable material in ways that are appropriately tailored to the function and design of their services. As Representative Cox, a sponsor of the bill, explained: "Government is going to get out of the way and let parents and individuals control [the Internet] rather than government doing that job for us." 141 Cong. Rec. H8460-01, 1995 WL 460967, at *28 (1995). Congress sought to achieve this goal by "encourag[ing] service providers to self-regulate the dissemination of offensive material over their services." *Zeran*, 129 F.3d at 331; 141 Cong. Rec. H8460-01, 1995 WL 460967, at *30 (Section 230 was designed to give interactive service providers "a reasonable way to ... help them self-regulate themselves without penalty of law") (statement of Rep. Barton).

Congress recognized that a legal regime in which liability could accrue when a service provider had notice of allegedly unlawful content but failed to act would perversely "reinforce[] service providers' incentives to . . . abstain from self-regulation," for fear of being held liable for anything a jury determines they should have uncovered in the course of their efforts to monitor their services. *See Zeran*, 129 F.3d at 333 ("Any efforts by a service provider to investigate and screen material posted on its service would only lead to notice of potentially defamatory material more frequently and thereby create a stronger basis for liability."). By passing Section 230, Congress freed service providers to adopt robust self-regulatory regimes, experiment with different approaches to self-regulation, and otherwise respond to the demands of the marketplace and the possibilities of technology without fear that by doing so they would be exposing themselves to potential liability. As described above, that is precisely what craigslist has done.

Thus, applying Section 230 here will serve Congress' intended purposes. And it will not, contrary to Defendants' claim, "literally open the legal floodgates for Internet service providers to advertise and encourage the most blatantly illegal activities" and leave States with "no means to stem the resulting tide of unlawful conduct." (Def. Mem. at 23.) As the Fourth Circuit recognized in *Zeran*, while Congress made a policy choice not to deter harmful online speech by permitting liability against companies that serve as intermediaries for other parties' postings, nothing in Section 230 precludes local or state authorities from prosecuting the parties responsible for the original posting. 129 F.3d at 330.

III. CRAIGSLIST STATES ACTIONABLE CLAIMS FOR RELIEF FROM DEFENDANTS' ACTUAL AND THREATENED VIOLATIONS OF THE FIRST AMENDMENT AND THE COMMERCE CLAUSE.

A. The Complaint States Valid Claims Under the First Amendment.

Defendants' motion ignores the critical fact, as alleged in the Complaint, that the only way for it to comply with Mr. McMaster's broad demand would be to shut down all portions of its site dedicated to South Carolina. *See supra* at 10. Mr. McMaster demanded that craigslist remove "the portions of [its] site dedicated to South Carolina and its municipal regions and which contain categories for and functions allowing for the solicitation of [prostitution] and the dissemination and posting of graphic pornographic material." (Compl. ¶ 48.) The "functions allowing" for third parties to post material (including material that McMaster characterizes as illegal) literally *are* the craigslist service; the ads and postings available on the craigslist website are created by the site's users, not craigslist, and craigslist has no practicable way — other than shutting down the site — to ensure that material of the kind identified in McMaster's letter is not posted. (*Id.* ¶¶ 21, 60.) Mr. McMaster's threatened prosecution, therefore, would effectively force craigslist to entirely shut down all of its South Carolina sites.

The First Amendment consequences of Mr. McMaster's threats are both obvious and significant. Thousands of South Carolinians participate on craigslist in a thriving free marketplace for jobs, housing, local services, community news and information, and countless other goods and services. They also participate in craigslist forums that allow users to exchange ideas about politics, religion, and the lives of their cities and towns. The craigslist service, in short, is an important medium for a community of users to exchange information and ideas — the vast majority of which is lawful and constitutionally protected. Forcing craigslist to shut down the site (as McMaster's threatened prosecution would do) would squelch the speech of all these individuals. Defendants, incredibly, dismiss this reality as "First Amendment blackmail." (Def. Mem. at 26.) Yet they make no showing (nor could they) that the allegations of the Complaint are untrue, and argue only that McMaster "never demanded such drastic steps." *Id.* But whether or not Mr. McMaster explicitly "demanded" that lawful speech be silenced, it is the inevitable consequence of complying with his demands, and a result the First Amendment does not tolerate.

As an initial matter, Defendants' focus on the lack of First Amendment protection for illegal activity (*see* Def. Mem. at 24-27) misses the point. The Complaint does not allege the facial invalidity of South Carolina's prostitution laws, nor does it assert that prostitution (or advertising prostitution) is protected by the First Amendment. craigslist instead alleges that Mr. McMaster's threats to prosecute it for the postings of third parties effectively restricts and restrains *other, entirely lawful* speech, that the First Amendment undoubtedly protects.[10]

1. Defendant McMaster's Threats of Prosecution Constitute an Unlawful Prior Restraint on Speech.

Mr. McMaster's threatened prosecution amounts to an unlawful prior restraint on speech. As the Supreme Court has recognized, any scheme that "conditions[s] expression on a licensing body's prior approval of content 'presents peculiar dangers to constitutionally protected speech.'" *Thomas v. Chicago Park District*, 534 U.S. 316, 321 (2002) (quoting *Freedman v. Maryland*, 380 U.S. 51, 57 (1965)). Accordingly, prior restraints on speech are specially disfavored by the First Amendment, and there is a "heavy presumption against [their] constitutional validity." *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971) (internal quotation marks

[10] craigslist has standing to assert the not only its own free speech rights, but also those of its community of users. *See Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 392-93 (1988) (permitting booksellers to assert First Amendment rights of buyers of adult books); *see also Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 64 (1963).

omitted). A prior restraint is constitutionally invalid unless it meets certain rigorous procedural requirements. *See Thomas*, 534 U.S. at 321 (restraint may be maintained for only a "specified brief period"; "expeditious judicial review" must be available; and "censor must bear the burden of going to court to suppress the speech and must bear the burden of proof once in court"). These strictures on prior restraints apply not only to formal licensing schemes, but also to *informal* actions by government officials that have the practical effect of censoring speech. *See Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 65 (1963) ("informal censorship may sufficiently inhibit the circulation of publications to warrant injunctive relief"); *Drive In Theatres, Inc. v. Huskey*, 435 F.2d 228, 229 (4th Cir. 1970); *LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1152-54 (9th Cir. 2000).

In *Bantam Books*, the Supreme Court held that the actions of a State morality commission amounted to an unlawful prior restraint even though the commission merely notified book distributors of objectionable material and had no power to apply formal legal sanctions. Noting that the commission often reminded distributors of its duty to make prosecution recommendations to the State attorney general, the Court observed that "[p]eople do not lightly disregard public officers' thinly veiled threats to institute criminal proceedings against them if they do not come around." *Id.* at 68. The Court concluded that, as a practical matter, the Commission's actions imposed a prior restraint on speech: "the Commission deliberately set about to achieve the suppression of publications deemed 'objectionable' and succeeded in its aim." *Id.* at 67. Because the State provided no procedure to judicially challenge or review the commission's determinations, the Court held the commission's activities unconstitutional.

The Fourth Circuit subsequently applied *Bantam Books* to enjoin a North Carolina sheriff who had mounted a campaign of threatened prosecutions against theaters showing movies not rated suitable for general audiences. *Drive In Theatres*, 435 F.2d at 228. The court found no meaningful difference between the sheriff's threats of prosecution and the system of informal censorship held unconstitutional in *Bantam Books*: "The only difference we see between the unlawful censorship activity of the [Commission] and the censorship activity of Sheriff Huskey is that he was not subtle and his threats were not veiled." *Drive In Theatres*, 435 F.2d at 230.

Bantam Books and *Drive In Theatres* squarely control this case. Mr. McMaster's persistent threats of prosecution were plainly intended to silence craigslist and its users and operate as an unlawful prior restraint on speech. He singled out craigslist and repeatedly, publicly threatened to criminally prosecute craigslist unless it took measures that would curtail protected speech on its website. Indeed, despite numerous voluntary measures craigslist implemented to deter the types of unlawful speech about which Mr. McMaster expressed concerns, he continued to threaten prosecution. And as in *Bantam Books* and *Drive In Theatres*, there were *no* procedural mechanisms available (short of this litigation) for craigslist to seek judicial review of McMaster's decision to single out craigslist for threatened prosecution. Mr. McMaster's conduct is in all relevant respects identical to the conduct proscribed by *Bantam Books* and *Drive In Theatres*.[11]

2. The Threatened Prosecution Would Impermissibly Impose Liability on craigslist Without Regard to Its Knowledge of Particular Unlawful Content.

Defendant McMaster's statements also threaten to apply State law in a manner that violates the First Amendment's requirement that, to impose criminal liability on an entity that acts as a clearinghouse for third-party information, the government must establish that the entity knew of the third-party content and its allegedly unlawful nature. *See Smith v. California*, 361 U.S. 147, 153-54 (1959). In *Smith*, the Supreme Court held that a bookseller could not be held criminally liable for possessing obscene literature absent proof that it knew of the material and its unlawful

[11] Defendants erroneously suggest that the rule of *Bantam Books* does not come into play unless a plaintiff challenges the validity of the underlying statute. *See* Def. Mem. at 24 (citing *State Cinema of Pittsfield, Inc. v. Ryan*, 422 F.2d 1400 (1st Cir. 1970)). Neither *Bantam Books* nor *Drive In Theatres* involved challenges to the statutes that underlay the state authorities' unlawful threats. *See Bantam Books*, 372 U.S. at 64-65; *Drive In Theatres*, 435 F.2d at 229.

nature. Absent such a scienter requirement, the Court explained, a bookseller "will tend to restrict the books he sells to those he has inspected; and thus the State will have imposed a restriction upon the distribution of constitutionally protected as well as obscene literature." *Id.* at 153.

Smith's reasoning applies here with equal force. To apply South Carolina law to hold craigslist strictly liable for the postings of others would, through fear of criminal liability, effectively limit the amount of information and communication on the entire craigslist site — not just the adult services section — to the amount that craigslist could itself review. (As the Complaint alleges (at ¶ 2), craigslist users post over 40 million ads monthly, an amount that would be prohibitively expensive and unwieldy to review.) This "chilling" effect would be all the more pronounced because of the uncertainty of the scope of South Carolina law in light of Mr. McMaster's threats against craigslist. The end-result would be a drastic restriction in the amount of speech on craigslist's site — and, if imposed equally on others, an even more drastic reduction of speech on the Internet as a whole. The effect would be the indirect suppression of speech that the State could not constitutionally suppress directly. *Id.* at 154; *see also In re Grand Jury Subpoena: Subpoena Duces Tecum,* 829 F.2d 1291, 1298 (4th Cir. 1987) (broad subpoenas for obscene videotapes issued on expectation that vendors would "comply based on their imputed knowledge of the contents of their inventories would tend seriously to restrict the dissemination of books and movies that are not obscene"). "[S]uch a tendency to inhibit constitutionally protected expression . . . cannot stand under the Constitution." *Smith*, 361 U.S. at 155. Mr. McMaster's broad threats to prosecute craigslist for third-party postings, regardless of craigslist's knowledge of their content and unlawful nature, violates the First Amendment.

3. The Threatened Prosecution Constitutes a Content-Based Restriction on Speech Not Narrowly Tailored To Further Any Compelling Government Interest.

Mr. McMaster's threatened prosecution also constitutes a content-based restriction on speech that is not narrowly tailored to further any compelling government interest; it would effectively ban a vast amount of protected speech to redress (at most) a relatively few instances of unprotected speech. Content-based restrictions are "presumptively invalid" and subject to the highest degree of scrutiny. *Ysursa v. Pocatello Educ. Ass'n*, 129 S.Ct. 1093, 1098 (2009). They are sustained *only* where "necessary to serve a compelling state interest" and "narrowly drawn to achieve that end." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37, 45 (1983).

The breadth of Mr. McMaster's threatened application of State criminal laws is plainly not "narrowly tailored" to achieve any compelling government interest. At most, Defendants have an interest in policing the small amount of *illegal* (and unprotected) speech of certain craigslist users. But that speech is, at most, only a tiny fraction of all the speech that takes place on craigslist's site, nearly *all* of which is clearly protected by the First Amendment. Prohibiting the vast majority of protected speech by effectively shutting down the operation of the site is certainly not "narrowly tailored" to the objective of preventing relatively few instances of illegal speech. *See Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 255 (2002) ("the overbreadth doctrine prohibits the Government from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process"); *PSINet, Inc. v. Chapman*, 362 F.3d 227, 234 (4th Cir. 2004) ("The Constitution provides significant protection 'from overbroad laws that chill speech within the First Amendment's vast and privileged sphere.'" (citations omitted)).

B. The Complaint States Valid Claims Under The Commerce Clause.

Defendants' effort to deflect craigslist's Commerce Clause claim again incorrectly focuses on South Carolina's statute prohibiting prostitution. That is beside the point: craigslist is not attacking the validity of the statute. Rather craigslist is challenging Mr. McMaster's threats to apply this law to prosecute craigslist for third-party content and effectively require craigslist to take down its entire site to avoid criminal prosecution. That threatened prosecution violates the Commerce Clause because it would regulate activities that take place outside of South Carolina and place burdens on interstate commerce that are excessive in relation to any local benefits.

First, "the Commerce Clause precludes the application of a State statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State." *Healy v. Beer Institute*, 491 U.S. 324, 336 (1989). Mr. McMaster's threatened prosecution is therefore barred in that it seeks to apply South Carolina law to activity that takes place wholly outside of the State. Postings on the South Carolina-directed craigslist site are not limited to persons or activities within the State; they can equally involve commerce that takes place in other (especially neighboring) States. Moreover, the South Carolina-directed site is viewable from anywhere in the world. McMaster's threatened prosecution would effectively shut down the site not only for persons posting and viewing in South Carolina, but for persons out-of-state who find the site valuable for discussion, goods and services, and other information. As the Fourth Circuit has said, "[g]iven the broad reach of the Internet, it is difficult to see how a blanket regulation of Internet material . . . can be construed to have only local effect." *PSINet, Inc.*, 362 F.3d at 240; *see also Southeast Booksellers Ass'n v. McMaster*, 371 F.Supp.2d 773, 787 (D.S.C. 2005) ("In the words of the Fourth Circuit, '[t]he content of the internet is analogous to the content of the night sky. One state simply cannot block a constellation from the view of its own citizens without blocking or affecting the view of the citizens of other states.'"(*quoting PSINet, Inc.*, 362 F.3d at 240)); *Cyberspace, Comms. Inc. v. Engler*, 55 F.Supp.2d 737, 744 (E.D. Mich. 1999) ("The internet is wholly insensitive to geographic distinctions, and Internet protocols were designed to ignore rather than document geographic location. ... Like the nation's railways and highways, the Internet is by nature an instrument of interstate commerce.") (citations omitted).

Second, States may not impose burdens on interstate commerce that "are excessive in relation to the local benefit it confers." *PSINet, Inc.*, 362 F.3d at 240. craigslist's South Carolina sites are forums for ads offering goods and services for sale in interstate commerce, and shutting down the site would impose significant burdens on that commerce. Moreover, attempts to regulate the South Carolina sites would regulate speech on national forums, involving persons in States outside of South Carolina. At the same time, the local benefit of the threatened prosecution would be minimal: South Carolina residents would have easy access elsewhere on the Internet and in other media to the same content that the Defendants seek to restrict. *See PSINet*, 362 F.3d at 240 (restriction of online sexually explicit material "will have no local benefit given the vast number of other communication options available").[12]

CONCLUSION

For all of the foregoing reasons, the Court should deny Defendants' motion to dismiss.

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Respectfully submitted,

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[12] Defendants' misapprehension of craigslist's Commerce Clause claim is underscored by their assertion — based on craigslist's statistics regarding ads contained in the South Carolina erotic services and adult services categories (40) vs. total number of ads on craigslist's South Carolina websites (well over 300,000) — that McMaster's threatened prosecution of craigslist "would affect only approximately .01% of the advertisement on the South Carolina websites [sic]. . . ." (Def. Mem. at 30.). In fact, because craigslist would be forced to entirely shut down its South Carolina sites to avoid potential criminal liability, the threatened prosecution would silence 100% of the ads, the vast majority of which concern lawful commercial transactions.